

Appellate Review of MERC Cases

(March 2004 through February 2005)

Roy L. Roulhac
Administrative Law Judge¹
Michigan Employment Relations Commission

Flint Professional Firefighters Union Local 352 v City of Flint and 68th District Court; AFSME Council, Locals 1600 and 1799 v City of Flint and 68th District Court; Flint Police Officers Association v City of Flint and 68th District Court, 2002 MERC Lab Op 322, Court of Appeals Nos. 244953; 244961 & 244985, issued June 17, 2004

In an unpublished opinion, the Court of Appeals affirmed in part, reversed in part, and remanded MERC's dismissal of an unfair labor practice charge alleging that the Respondent City of Flint made a unilateral change and mid-term contract modification to the collective bargaining agreement. The contracts provided that the final average compensation (FAC) for the purpose of computing pension benefits shall be calculated on "the highest annual compensation paid said members by the City of Flint during any period of three years." In the early 1990s, several employees began choosing their three final annual compensation years in which the first day and last day of the year were paydays. Between January 1991 to January 2000, 284 of 671 union and non-union employees used dates in which there would be 27 pay periods when calculating their FAC, resulting in an increase of at least 3.7% in their pension benefits. The dispute in this matter arose when Respondent amended its policy to direct the payroll and retirement supervisor to only consider a total of 26 bi-weekly pay periods in calculating the FAC. The Charging Parties alleged that because the FAC was previously computed on a basis of 27 pays, Respondent unilaterally modified the contracts.

MERC found that the term "annual compensation" unambiguously limited the number of bi-weekly pay periods to 26. MERC also concluded that the calculation of the FAC on a basis of 27 pays did not amount to a past practice that altered the contracts because the parties did not knowingly, voluntarily, and mutually agree to the changes and neither party mentioned the issue during negotiations. Therefore, MERC held that the amendment to the retirement policy was a clarification of the contract instead of a unilateral modification.

The Court of Appeals agreed that "annual compensation," by definition, includes only 26 bi-weekly pay periods. The Court reasoned that the "27th pay date represents monies received for work done in a different year period." The Court further affirmed MERC's holding that the practice was not "so widely acknowledged" as to change the contract in allowing the employees to utilize 27 pay periods during the full three years on which the FAC was to be computed. However, contrary to MERC's decision, the Court found that there was a sufficient past practice established to amend the contract to allow employees to use 27 pay periods for one of the three years in calculating the FAC. The Court noted that even when a payroll and retirement supervisor chose the year in which the FAC was to be

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calculated, he or she often chose years in which there were 27 pay dates. Therefore, the Court held that Respondent unilaterally modified the collective bargaining agreement.

Respondent argued that, with regard to Petitioner Flint Police Officers Association, the collective bargaining agreement had expired and the issue had been submitted to arbitration. The arbitration panel found that the FAC should be computed using a 26 bi-weekly pay period. The Court still found that Respondent committed an unfair labor practice by unilaterally modifying the FPOA's contract. The Court stated that when a collective bargaining agreement expires, "all the parties have a duty not to unilaterally change the status quo during negotiations unless the parties have bargained in good faith to the point of impasse." Because Respondent did not negotiate to impasse, the Court reasoned that the arbitration ruling is irrelevant to the present issue. The Court then concluded that FPOA is entitled to recover for Respondent's unfair labor practice because the parties formed a valid contract regarding the number of pay periods to be used in calculating the FAC before the arbitration award. The Court subsequently remanded the case to MERC to effectuate the decision.

This case is currently on appeal to the Michigan Supreme Court.